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IN THE

Supreme Court of the United States

June Term 1971

JOSEPH BIEHUNIK, DONALD WHALEN, JOSEPH DENECKE, *et al.*,

Petitioners,

vs.

FRANK N. FELICETTA, Commissioner of Buffalo Police Department, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of the Case

The facts set forth in the petition are essentially correct. Therefore, we state herein only those facts not contained in the petition and which we deem pertinent to the issues presented.

Certain persons on the premises were punched and beaten, an unidentified caustic spray had been used therein affecting the eyes of the occupants (some of whom were infants of extremely tender age), the doors of the apartment had been broken down and the apartment ransacked. This was verified by Police Inspector Howard Wheeler

based on his first hand observations of the apartment and of the victims at the hospital where they had been taken by an ambulance immediately following the incident. In addition, the victims made sworn statements to the foregoing, and a report of the incident was made to the Commissioner of Police by officers of the 12th Precinct. No search warrant was obtained to enter the premises.

A complete investigation of the incident was ordered by the Commissioner. However, the victims were unable to identify any of the officers involved from 104 police photographs, selected at random from neighboring precincts but from an examination of police records and radio logs, the department was able to ascertain that 62 policemen, 6 of whom were detectives, appeared at the scene. Because of the inability of the victims to identify their assailants by name, badge number or photographs, the Commissioner ordered those 62 officers whom the records indicated appeared at the scene, to appear in a lineup.

These officers, almost without exception, were purposely ordered by the Commissioner to appear at a time when they would have otherwise been working on a regularly scheduled tour of duty.

At no time did the Commissioner or any of his command officers threaten or attempt to coerce in any form or manner any of the 62 officers to waive or relinquish any of their Federal Rights prior to their appearance in the lineup.

The following facts will not appear in the record but we state them in the belief that they have a material bearing on this Court's decision.

Subsequent to issuance of the Mandate of the 2nd Circuit, the appellants made a motion to that Court to recall its Mandate. The motion was denied on March 24th, 1971.

Thereafter, the Commissioner reissued his order for the lineup but this time included not only 56 of the original 62, but also 226 additional officers whose sole purpose was to act as "decoys". They were to appear in four groups of approximately 70 officers on four different nights. Immediately thereafter Petitioners applied to this Court for a stay of the Mandate pending application for a Writ of Certiorari. On March 23, 1971, Mr. Justice Harlan denied the application.

These 282 officers appeared at Police Headquarters as directed, in groups of approximately 70, on the four different nights. Before being directed to stand in a lineup, each group was read the following:

> "I hereby advise you that you and each of you have all the rights and privileges guaranteed by the Laws of the State of New York and the Constitution of the State of New York and the Constitution of the United States, including the right to be represented by counsel at this line-up and that should you fail to stand in the line-up as ordered by the Commissioner of Police you may be subject to disciplinary action by the Department of Police that could result in your being reprimanded, fined, suspended from duty or dismissed from the Police Department.
>
> I further advise that any identification, information or evidence which may be gained by reason of your standing in this line-up, as ordered, may not be used against you in a criminal proceeding but may be used only in a disciplinary action by the Department of Police."

Thereupon, all of the 282 officers refused to lineup. Departmental charges of insubordination were placed against all of the officers.

Questions Presented

1. Does the order of the Commissioner of Police directing the 62 subordinate officers who were at the scene of the occurrence to appear in a lineup violate the Fourth Amendment Rights of these officers when the Commissioner has reasonable cause to believe that some of these officers committed gross acts of misconduct resulting in known injuries to innocent victims?

2. May police officers who have not been prevented from asserting their Federal Rights, or who have not been threatened with loss of employment for refusal to waive them, refuse to appear in a lineup in furtherance of an investigation by their superiors relative to their conduct in office, and at the same time be constitutionally protected against disciplinary actions?

Why Certiorari Should be Denied

The District Court was asked to invoke its discretionary equity powers and to enjoin the Commissioner of Police from conducting the lineup. The holdings of this Court in *Younger v. Harris*, ____ U. S. ____ 27 L. Ed. 2d 669, 91 S. Ct. ____; *Samuels v. Mackell*, ____ U. S. ____, 27 L. Ed. 2d 688, 91 S. Ct. ____; and *Perez v. Ledesma*, ____ U. S. ____, 2 L. Ed. 2d 701, 91 S. Ct. ____, decided earlier this year should be applicable to the present situation, accordingly the action of the District Court was inappropriate.

Requiring police officers to appear in a lineup set against the factual background of this case, does not raise a substantial constitutional question, warranting the granting of certiorari.

The principles of law handed down by this Court in *Gardner v. Broderick,* 392 U. S. 273, and related cases are dispositive of the main issue herein.

I

The order of the Commissioner directing the lineup did not deprive petitioners of any rights, privileges or immunities secured by the Constitution and laws as contemplated by U. S. C. A. Title 28 Section 1343(3) and U. S. C. A. Title 42, Section 1983. Thus the exercise of the District Court's discretionary equity powers was unwarranted.

The petitioners, after being advised of their constitutional rights which included the right to be represented by counsel of their own choosing, were merely directed to appear. They were not physically or forcibly made to appear nor was there any intimation that should they not appear, they would be forcibly taken into custody for that purpose.

There did, admittedly, arise the possibility that disciplinary proceedings would be commenced should they refuse to obey the command.

From these facts, assuming the refusal to stand, arose the issue whether these police officers could be disciplined upon proper departmental proceedings.

Whether or not disciplinary proceedings can be constitutionally commenced and sustained for that reason, may be a valid Federal question. But the District Court, in the sound exercise of its discretionary powers of equity, should have refused to enjoin the order, thereby leaving the officers to make their choice, whether or not to appear.

The District Court, by inappropriately exercising its equity powers and enjoining the order in fact, so totally disrupted the operation of the investigatory process as to virtually stifle the Commissioner in this legitimate pursuit.

We urge for this Court's consideration that the action of the District Court was in direct conflict with the principles enunciated by this Court in its decisions of February 23, 1971, in *Younger v. Harris*, ____ U. S. ____, 27 L. Ed. 2d 669, 91 S. Ct. ____; *Samuels v. Mackell*, ____ U. S. ____, 27 L. Ed. 2d 688, 91 S. Ct. ____; and *Perez v. Ledesma*, ____ U. S. ____, 27 L. Ed. 2d 701, 91 S. Ct. ____.

The investigation being conducted by the Commissioner concerning serious acts of misconduct, was an administrative proceeding commenced in "good faith", justified, assuredly, by more than probable cause.

Admittedly the factual situation of the above cases, differs from the one at hand, but the principles enunciated therein are, in our opinion, applicable.

All of the important elements the Court found to exist in those cases and which were set forth in great detail, as to why and when intervention in a State Proceeding by a Federal Tribunal is warranted, exist in abundance in this case.

If and when disciplinary proceedings are commenced the Federal issue as to the propriety of the lineup can be resolved by State Tribunals and the petitions will be fully and completely vindicated should the issue be resolved in their favor. Should it become necessary, review to this Court by certiorari or appeal will eventually be available. The investigation and more particularly the lineup was undertaken in good faith without even the slightest inference of harassment. The only irreparable injury alleged

is that which automatically flows from Court proceedings. This type of irreparable injury has ofttimes been rejected by this Tribunal as insufficient. No extraordinary circumstances were alleged that would render federal injunctive relief appropriate against administrative proceedings already in process.

There is nothing in the record nor is there anything as a matter of fact that even remotely suggests that this investigation was undertaken by the Commissioner other than as a good-faith attempt to enforce the States and the public's interest in a well ordered police department.

In addition to the foregoing, we now direct our argument to the merits of the present case.

II

Essential to the petitioners' argument is the proposition that there must be probable cause to effectuate a legal arrest, or that an individual must be under legal arrest or under indictment before the authorities can subject him to a lineup.

Although we concede the efficacy of this proposition as a general rule, we reject as did the Circuit Court, that it must be applied inflexibly, regardless of the uniqueness of the underlying circumstances, particularly in cases far removed from the criminal arrest area. (See opinion of 2nd Circuit Court in this case).

In a situation such as confronts us herein, the dictates of the Fourth Amendment protect individuals not from all searches and seizures, but rather, only from those that are unreasonable enough to offend the concepts of Due Process found in the Fourteenth Amendment.

This Court in *U. S. v. Rabinowitz,* 339 U. S. 56, at page 63, stated:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable searches' and regrettably in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

This principle was affirmed by this Court as recently as *Mapp v. Ohio,* 367 U. S. 643, at pg. 653.

> We are confronted herein not with a search or seizure but, rather, with what would be more closely akin to detention and inquiry, the legality of which, as indicated above, is always to be determined by its reasonableness.

The Constitution can never be considered as at war with the dictates of common sense. Therefore the recurring question of the reasonableness of a search must be determined by a delicate balancing of the interests to be served by permitting said search against the interests of the individual who claims to be aggrieved.

It therefore behooves us to examine the interests to be served on each side of the issue.

This Court in *Mapp v. Ohio,* (*supra*) at pg. 659 quoted Mr. Justice Brandeis as follows: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . . . If the Government becomes a law breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

Throughout history, has any segment of Government been regarded by the average person as more representative of government, than the Police Department?

We have in issue the reasonableness of a lineup used herein by the Commissioner as one of the means of investigating serious acts of misconduct committed by his subordinates in order that the responsible parties might be properly identified and appropriate disciplinary action be taken.

Commenting on the public's interest in this type of situation the Circuit Court below in its opinion said:

> "Decisive to our conclusion that the lineup was indeed 'reasonable' is the substantial public interest in ensuring the appearance and actuality of police integrity. We do not believe that the public must tolerate failure by responsible officials to seek out, identify, and appropriately discipline policemen responsible for brutal or unlawful behavior in the line of duty, merely because measures appropriate to those ends would be improper if they were directed solely toward the objective of criminal prosecution. A trustworthy police force is a precondition of minimal social stability in our imperfect society, a fact repeatedly dramatized by tragic incidents of violent conflict between police and some groups of civilians that continue to break out periodically in so many of our cities."

That grave public interest warrants certain impositions upon individual rights is to be found in cases involving National Security.

In addition to the existence of a substantial public interest, we consider the gross factual situation of this case which was known to the Commissioner at the time of the command to be of prime importance to the disposition of the issue before the Court. Sworn statements by the victims verified by Police Inspector Howard Wheeler based on his first-hand observations of the results of said acts and a report made by officers charged with investigating the incident surely supplied the Commissioner with probable cause

to believe that certain acts of misconduct had been committed by some of the 62. These factors coupled with the inability of the victims to more particularly describe the culprits by name or badge number and their inability to ferret out those responsible by the use of departmental photographs establishes the prerequisite necessity of the lineup as a method of investigation.

Having established a substantial public interest in preserving the integrity and well-ordained discipline of the Police Department and the necessity of using the lineup as a means of investigation, we now direct our attention to the question whether as a method this lineup violates the Due Process clause of the Fourteenth Amendment in that the treatment is of a kind that "shocks the conscience, offends a sense of justice and fails to respect certain decencies of civilized conduct". See concurring opinion of Mr. Justice Black, *Mapp v. Ohio (supra)* pg. 664.

In this regard we consider most relevant these facts:

The lineup was scheduled, purposely by the Commissioner, for a time when virtually all of the 62 were to be working on a regularly scheduled tour of duty, subject to the commands of their superiors.

The lineup was to take place in the very familiar and friendly surroundings of Police Headquarters.

The 62 had been afforded the opportunity to be represented by counsel of their own choosing, as indeed they were, and a representative of the Police Benevolent Association. This was to assure them that the lineup would meet the standards of Due Process and the requirements set down by this Court in *U. S. v. Wade*, 388 U. S. 218.

Last, but not least, the 62 were informed of all of their constitutional rights and that they could assert such rights.

Set against this background, it is difficult for us to comprehend how such a lineup could be considered of the "rack and screw" variety.

Another factor which we consider relevant based on readings of *Mapp* and those cases preceding it, is that all that could result from said lineup were identifications, not considered by this Court to be of the same nature as real evidence, *e. g.* "fruits of the crime", "contraband" or "products used in the commission of the crime". See *U. S. v. Wade (supra)*. In other words, these officers were not being compelled to produce incriminating evidence against themselves, as contemplated by the Fifth Amendment.

Still another factor we consider supportive of the lineup is the substantial interest of the State in maintaining a well-disciplined, law-abiding Police Department. This Court recognizing this interest of the State has given its approval to State action which requires public employees, particularly police officers, to cooperate with their superiors in one effort to attain that legitimate end. See *Gardner v. Broderick*, 392 U. S. 273.

It is appropriate at this point to examine the interests on the other side of the coin in order to determine whether these interests balanced against the interests hereinbefore discussed, require this Court to find that said lineup so unreasonably infringes upon the rights, privileges and immunities of the 62 secured by the Fourth Amendment as to make it violative of the Due Process clause of the Fourteenth Amendment.

As suggested earlier, said lineup was arranged purposely by the Commissioner to take place at a time when virtually all of those involved would otherwise be on regularly scheduled duty and in the friendly and familiar confines of

Police Headquarters. It is most apparent, that any deprivation of the rights or privileges of the 62 was at most minimal and the "search and seizure" completely within the bounds of civilized decency.

There remains to be examined petitioner's contention that said lineup was ordered by the Commissioner, solely to obtain identifications for the purpose of commencing criminal proceedings against some of the 62.

Although this is not correct, in any event, the decision of this Court in *Garrity v. New Jersey,* 385 U. S. 493 and related cases, *Gardner v. Broderick (supra), Spivack v. Klein,* 385 U. S. 511, *Sanitationmen v. Sanitation Commissioner,* 392 U. S. 280 completely destroys the legal impact such contention might otherwise impart. See also *Sanitationmen v. Sanitation Commissioner,* 426 F. 2d 619 (1970).

In this regard we direct to the Court's attention the unassailable fact, that the appearance of the 62 in the lineup was in no way, shape or manner, conditioned upon a waiver or relinquishment of any or all of their Federal rights. Never were they asked to sign a waiver of immunity before their appearance.

If the 62 refused to appear in the lineup, disciplinary proceedings, if any, would have been commenced solely for their failure to cooperate in the investigation and not for refusing to sign away any of the rights secured by the Constitution. The validity of commencing disciplinary proceedings based on said refusal, under the facts and circumstances of this case, we submit, is confirmed by this Court's opinion in *Gardner (supra)* and other related cases.

The teachings of this Court tell us that a policeman can be compelled by his superiors to answer questions narrowly relating to his conduct in office upon the threat of loss of

employment unless the opinion of Mr. Justice Fortas in the *Sanitationmens* case *(supra)* is to be considered a futile exercise in rhetoric. At page 283, the Court stated:

> "Petitioners were not discharged merely for refusing to account for their conduct as employees of the city. They were dismissed for invoking and refusing to waive their constitutional right against self-incrimination. They were discharged for refusal to expose themselves to criminal prosecution based on testimony which they would give under compulsion, despite their constitutional privilege."

Further at page 284, the Court said:

> "As we stated in Gardner v. Broderick (supra), if New York had demanded that petitioners answer questions specifically, directly and narrowing relating to the performance of their duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so, this case would be entirely different. In such a case, the employee's right to immunity as a result of his compelled testimony would not be at stake."

In closing, at page 285, it said:

> "At the same time, petitioner's, being public employees, subject themselves to dismissal if they refuse to account for their performance of their public trust, after proper proceedings, which do not involve an attempt to coerce them to relinquish their constitutional rights."

That the said majority opinion recognizes a distinction between police officers and civilians, is corroborated, we submit, by the language found in the concurring opinion by Harlan, J. and Stewart, J. in Gardner at page 285:

> ". . ., I find in these opinions a procedural formula whereby, for example, public officials may now be discharged and lawyers disciplined for refusing to divulge to appropriate authority information pertinent to the

> faithful performance of their offices. I add only that this is a welcome breakthrough in what Spevack and Garrity might otherwise have been thought to portend."

Not having been required to waive immunity or to relinquish the ability to assert at the time of the lineup or at a future time any and all Constitutional rights, petitioners are in position effectively to protect themselves against the use of these identifications in a possible criminal prosecution.

In concluding this argument we quote for the consideration of the Court, from the dissenting opinion of Mr. Justice White, in the Spevack case *(supra)* at pg. 532:

> "The majority does not deny that the State and its citizens have a legitimate interest in ridding themselves of faithless officers. Admittedly, however, in attempting to determine the present qualifications of an employee by consultation with the employee himself, the State may ask for information which, if given, would not only result in a discharge but would be very useful evidence in a criminal proceeding. Garrity, in my view, protects against the latter possibility. Consequently, I see no reason for refusing to permit the State to pursue its other valid interest and to discharge an employee who refuses to cooperate in the State's effort to determine his qualifications for continued employment."

Conclusion

For the foregoing reasons, the Petition for a Writ for Certiorari to review the judgment and opinion of the Second Circuit, should be denied.

Respectfully submitted,

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